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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 73

H. J. HEINZ COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR H. J. HEINZ COMPANY, PETITIONER.

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Introduction.

The brief for the National Labor Relations Board is shot through with misstatements of fact and extravagant inferences which could be easily refuted but, inasmuch as we have presented the Court with a fair statement of the ultimate facts in our original brief, a detailed analysis of the charges in the respondent's brief is not necessary. However, we believe that we are entitled to advise the Court that many of the statements in the respondent's brief are contrary to its own findings of fact.[1]. In addition, it is proper to observe that many of

1. For example, in its present brief (page 19) the statement is made that the Association was formed by five employees led by Ben-

the statements in the respondent's brief are followed by an elaborate string of references to the record, many of which prove to be either beside the point or contradictory of the assertion in the brief.[2] The Board has also resorted to the dubious device of lifting extracts of testimony from their context and of joining unconnected events, for the purpose of painting an unfavorable picture of the petitioner. For example, on page 72 of the brief, the statement is made that

> "as a ground for its elimination of all details of the grievance machinery from the agreement, petitioner *stated* (sic) that it would be unfair 'to the minority party among the employees' to intimate that 'these 800 men who belong to the Association * * * could do anything through the Union grievance committee.'"

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nett, *"a group leader* * * * who thereafter became its president." With this may be compared the Board's finding (R. 205) that Bennett was a *"mechanic* in the Can Department." Again, on a most important issue in the case, viz., whether or not an agreement was actually reached between the petitioner and the Union, the Board, (Footnote 33, page 44) seeking to avoid a flat admission by one of its principal witnesses, declares that the testimony of Wilner, the Union's attorney, was "simply to the effect that by posting the memorandum petitioner became 'bound' by it as 'matter of psychology.'" This is not only a deliberate misstatement of the testimony of Wilner; it is directly contrary to the Board's finding of fact (R. 219) that Wilner "admitted that the respondent (petitioner) 'by posting the agreement on its bulletin boards on August 15, 1937, became bound thereby.'" The Board has also seen fit, on many occasions, to make statements contrary to its own evidence. Thus, in Footnote 22, on Page 34, it states that group leaders are not eligible to membership in the Union, disregarding the terms of the Union's proposed contract (Board Exhibit "6") that "working foremen" would be covered and the provisions of the Bulletin Agreement which excluded only those foremen and assistant foremen who were paid on a *salary* basis.

2. A glaring example of this practice appears on pages 20 and 21 of the respondent's brief, where the statement is made that a "number of employees testified that they signed the petitions only because of the fear of discrimination aroused by the foremen and supervisors." In support of this extravagant charge, eighteen references to the record

If we examine the record references in support of this remarkable assertion, it will be found that it is pieced together from the cross-examination of Wilner, attorney for the Union, who testified, in substance, that he desired to have the grievance procedure set forth in the bulletin for psychological reasons, viz., so that all of the employees would know that they had the right to come to the Union grievance committee. The statement which the Board attributes to the petitioner is, in fact, a conglomeration of extracts from questions of the cross-examining counsel, who was asking such questions to elicit from Wilner an admission that the Union would not take up grievances for non-members.

We could continue these glaring illustrations, but time does not permit discussion in this reply brief of the many other similar inaccuracies and we will now turn to a few points suggested in the argument for the respondent, which may merit a brief reply.

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are given, apparently for the purpose of creating the impression that eighteen employees were forced to sign Association petitions. Without going into a detailed analysis of the testimony, we desire to direct the Court's attention to a few glaring errors in the statement. Among other things, it appears, from the references cited by the respondent (a) that only fifteen employees were involved; (b) that at least four of them testified that they did *not* sign the petition; (c) that of the four, three testified that they were *not* asked to sign; (d) that of the fifteen, four (female employees) testified that they signed the petition after a meeting in their department which had been addressed by an advocate for the Union and an organizer for the Association, while one testified that she attended the same meeting but could not remember whether she had signed the petition before or after the meeting was held; (e) that two of the five girls gave some specific reason for signing, other than coercion or fear; (f) that another of the fifteen testified that a watchman (not a supervisor) asked him to join the Association and that he did so "under the impression that it would be the best thing to do to keep out of trouble"; and (g) that another testified that he signed because of a "rumor" that he would be better off.

I.

The Opinion of This Court in International Association of Machinists, Etc. v. National Labor Relations Board Is Not Controlling in This Case.

The argument of the respondent under Part I of its brief, which deals with the issues discussed under Part II of the petitioner's brief, relies almost exclusively upon the opinion of this Court in *International Association of Machinists, etc. v. National Labor Relations Board,* No. 16 of this Term, decided November 12, 1940. As we analyze that opinion, the Court was dealing with the validity of an Order of the Board which required the abrogation of a "closed shop" agreement between an employer and a union which the Board found to be employer-dominated. The petitioner in the case (the dominated Union) attacked the validity of the order on the ground that there was no proof that the employer had authorized or ratified the coercive tactics of certain supervisory officials who had taken part in the organization of the dominated Union. This Court disposed of the intervening Union's argument by pointing out that the Act was designed to remove "all taint of an employer's compulsion" from the processes of collective bargaining and that since the facts established that there had been coercion, the Board could properly hold that the dominated Union had not been the free choice of the employees. From this it followed that neither the employer nor the dominated Union should have the right to insist upon enjoying the fruits of a contract which had its origin in compulsion.

The situation in the instant case is strikingly different. Here, there is no question of an employer or a Union asking the retention of the fruits of an illegal contract or an illegal status. The Order in this case is an Order to cease and desist from alleged improper acts,

viz., (a) from interference, restraint and coercion, and (b) from recognition of the Association. It is our point that an order to cease and desist from *past* practices (which were discontinued long before the complaint was issued) cannot be justified, where it is shown that the employer did not authorize the practices, but on the contrary, promptly repudiated them and prevented their recurrence.

At the risk of repetition, may we again point out that the argument of the Board evades the most salient facts on this issue. Conceding that supervisory employees may have indulged in improper acts and speeches in the early days of the organizing drive, it must not be forgotten that, as soon as the Union made a complaint of alleged interference to a responsible executive of the petitioner, he called the supervisors together and repeated earlier instructions (issued by the superintendent) to the effect *that the petitioner insisted upon absolute neutrality and would not tolerate any coercion of its employees.* More than that, he reported his action to the Union officials and they expressed their satisfaction with his instructions. It is most unfair for the Board to say, as it does, that the petitioner failed to do more than instruct its supervisory officials, when it clearly appears from the Board's own witnesses that the Union was advised of the instructions, approved them and did not request the petitioner to take any further action. It is equally unfair to infer that the instructions were ineffective. They were issued to the supervisors with the stamp of authority of the manager of the Pittsburgh plant. Moreover, although they were issued several days *before* the strike, there is no evidence in the record that any of the alleged improper acts were repeated *after* Riley's instructions had been given.

If the alleged improper acts had any coercive effect, that effect was certainly dissipated by the strike, the

election agreement, the election itself and the subsequent recognition of the Union. So far as the Association is concerned, the record clearly shows that it was entirely replaced by the Union, at least from the standpoint of employer recognition. If its organizers decided to keep it alive as a social group, in the hope of recognition in the distant future, they surely had the right so to do. Their hopes and desires, in any case, ought not be used as an excuse to find that the employer is dealing with or recognizing an organization which, so far as the employer is concerned, has ceased to exist as a bargaining agency.[3]

On these facts, the cease and desist order in this case becomes punitive and not remedial. We cannot believe that this Court, in its opinion in the *Machinists* case, intended to rule that the doctrine of responsibility would be relaxed to the point of holding an employer accountable for discontinued acts, which it never authorized, which it repudiated, and which it prevented from recurring. "A court of equity will not grant an injunction to restrain one from doing 'what he is not attempting and does not intend to do.'" *Virginia Electric and Power Company v. National Labor Relations Board,* C. C. A. 4. (Decided November 12, 1940.)

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3. In this connection, the Board says, at page 71 of its brief, that the petitioner would not name the Union in the bulletin because such action might impair the Association's efforts to achieve majority designation and recognition, and that petitioner was avoiding "any action which might cause the Association 'to quit.'" The record shows that no such reasons were ever assigned by the petitioner. On the contrary, the testimony shows that when Riley (petitioner's officer) was told by the Board attorney that when one Union lost an election, it ought to "quit", Riley replied "maybe they should. I don't know. It's up to them to decide, not me. They can't *misuse* me to make them quit."

II.

The Board's Argument on the Question of the Written Contract Fails to Give Effect to the Fact That There Was a Written Contract in This Case.

The petitioner's original brief has apparently demonstrated to the Board that its Order in this case is far more sweeping than an order to commit to writing agreements which have been already reached. As we pointed out, the petitioner and the Union, long before the complaint in this case was filed, came to an understanding on the subject of wages, hours and working conditions and committed that understanding to the form of a written memorial. We also demonstrated that in the course of the negotiations substantial concessions were granted by the petitioner to the Union, and that the Union itself openly boasted, after the bulletin had been posted, that it had obtained a firm contract, which contained many advantages for the employees. As a consequence, the Board's order in this case unquestionably has the effect of undoing a firm agreement, of compelling the parties to re-negotiate with respect to matters which have already been decided, and of forcing the employer to embody the results of the *new* negotiations in a particular form of contract desired by the Board if so requested by the Union.

To escape these enormous consequences of its Order, the Board has attempted to argue that no contract was ever reached. To attain this end, it has been forced to indulge in misstatements and omissions. For example, it says that the petitioner was not bound by the contract and that it could ignore it at will. This contention shows a thorough disregard for the express provision of the bulletin that "the wage rates and other

conditions hereinabove set forth shall remain in effect until further notice".[4] Again, the Board attempts to create the inference that the Union's name did not appear in the published bulletin and that the published bulletin did not accord full recognition to the Union. How can this be squared with the opening recital in the bulletin that "we have bargained with the certified collective bargaining agency for our employees * * * and the following understanding has been reached?" How can it be reconciled with the provision in the closing paragraph that *"in case of any disagreement, any employee or group of employees has the right to refer the matter to the Canning and Pickle Workers Local Union No. 325, in accordance with the grievance procedure now in effect between the Union and the Company."*

Another instance of evasion is the statement in the footnote on page 44 of the respondent's brief that the "testimony of Wilner, the Union's attorney, upon which petitioner relies, is simply to the effect that by posting the memorandum, petitioner became 'bound' by it as a 'matter of psychology.'" Wilner definitely testified that in the course of the negotiations, the Union obtained many concessions; moreover, in answer to the question, "You know that the Company, by posting that contract and that signed statement on the bulletin board, became bound by that?" replied "Yes." *Wilner's reference to the "matter of psychology" had nothing to do with the question of the binding effect of*

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4. On this point, the Board betrays the fact that it is not satisfied with any labor agreement which is not for a definite term. Is this not inconsistent with its admission that the Union in this case did not desire a contract for a fixed period? Is this not also inconsistent with the Board's studied disclaimer of any intention to dictate the substantive terms of the bargain? Compare also the Board's frequent condemnation of the petitioner because it declined to incorporate a detailed description of the grievance procedure in the contract.

the contract but related only to the Union's reason for desiring a written contract (and according to Wilner) for a definite term. In other words, Wilner was admitting in his testimony that there was a binding written contract but stating that, for psychological reasons, the Union desired a particular form of writing. This was once admitted by respondent, for in its Decision it definitely found as a fact (R. 219) that Wilner admitted the existence of the agreement.

The Board also stresses the fact that, in its view, the Union did not accept the agreement as a binding contract, because on August 17, 1937 (Board Exhibit "23") one of its leaders wrote to the petitioner that the bulletins did not, in the opinion of the Union "constitute an agreement *within the intent of the memorandum of understanding*" (viz., the election agreement) between the Union and the Company. It is quite clear that the writer of this letter was not serving notice that the Union did not agree to the terms of the bulletin, for he also wrote that "we realize that the concessions gained for the employees in the H. J. Heinz Company were the direct results of our efforts." It is equally clear that the Union objected to the form of the bulletin, not because it was not a binding agreement, but because the Union believed it did not conform to the understanding embodied in the election agreement. Moreover, in this the writer of the letter was mistaken, for it will be recalled that when the election agreement was prepared, counsel for the Union wanted the term "written agreement" and subsequently agreed to the omission of the word "written." It is also plainly apparent from literature circulated by the Union after the bulletin was posted and from articles in the Union's own news organ, that it considered the bulletin as a binding contract (see petitioner's original brief, pp. 26 and 27).

In the last analysis, the Board is forced to concede that there was a contract in this case and that it was reduced to writing. From this it follows that the Board's Order in this case must be treated as an arrogation of the right to cancel the agreement, and to compel the parties to begin negotiations anew.

One more point in the Board's treatment of the contract issue deserves mention. The Board consistently disclaims any intention to compel trade agreements, insisting that it merely desires the petitioner to embody its labor agreement in the form of instrument which the Board considers customary in labor relations. This oblique approach has been fashioned in the hope of eliminating from consideration the petitioner's point that the legislative history of the Act, the utterances of Congress, and the structure of the Act itself demonstrates that Congress did not intend to compel an employer to make a contract against his will. Despite the Board's assurances on this point, its method of approach to the question shows that it believes that it has the right to prescribe the terms of a labor agreement. Thus, it assigns as reasons for its order the following alleged circumstances: (1) that the petitioner suddenly raised the point of its policy against signed, formal agreements, after a long period of negotiation with the Union;[5] (2) that the petitioner employed dilatory tactics in the course of the negotiations; (3) that the petitioner did not want a contract for a fixed term; (4) that Anderson allegedly repudiated an understanding already reached by Riley and Shinabarger; (5) that the petitioner at-

5. In this connection, it may be pointed out that the Board's inference to this effect is plainly belied by its own evidence that while the election agreement was being negotiated, and before the process of bargaining began, the petitioner insisted on striking out the word "written" from the election agreement. Moreover, in its Decision, the Board found that petitioner took this attitude from the beginning (R. 224, footnote 12).

tempted to hold down the bargaining power of the Union; (6) that the petitioner refused to incorporate the grievance procedure in the final bulletin and insisted upon phraseology not approved by the Board; and (7) that the petitioner insisted on incorporating in the bulletin a statement that all employees had, as provided by the Act itself, a right to present grievances to the employer.

It is quite clear that these factors, upon which the Board counts so heavily, concern the negotiations themselves and the ultimate substantive terms of the contract. If the Board may thus review the process of negotiation, condemn the employer because of its "hard-hearted" attitude and criticize not only the wording but also the substantive terms of the contract, then it may, with equal propriety, dictate the content of any labor agreement, according to the circumstances under which it is written.

The Board's extended argument on the construction of the Act, requires no answer, inasmuch as the issue has been explored in our original brief. However, in closing our reply, it may be advisable to mention the Board's argument that it is entitled to compel a formal written agreement in this particular case, by virtue of its remedial powers under the Act, even though the Act itself does not compel such agreements. As we have pointed out in our original brief, the Board's powers are co-extensive with the substantive provisions of the Act and there is no reason for supposing that Congress intended to delegate its legislative powers to the Board. In the second place, the argument proves too much. Thus, the Board argues, at page 67 of its brief, that "to avoid the sterility to which petitioner's persistence in its attitude would condemn future bargaining between the parties, the Board may make specific provision against one aspect of petitioner's failure to manifest the requisite

good faith." We interpret this to mean that, since the Board does not approve of the petitioner's attitude in the course of negotiations or of its methods of bargaining, it believes it has the power to prevent the petitioner from manifesting the same attitude and using the same methods in the new negotiations ordered by the Board. Why, then, may not the Board prescribe that the new negotiations be handled by the petitioner's President, that they be completed in ten days, that a ten per cent. wage increase be given, and that the contract be a formal, sealed instrument, with a 2-year term?

As this Court said in *Republic Steel Corporation v. National Labor Relations Board et al.*, No. 14 of this Term, decided November 12, 1940:

> "This language [Section 10 (c)] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 267, 268. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

It is just as logical for the Board to use its remedial powers as an excuse for writing the contract, as it is to use them as a pretext for abrogating an existing agreement.

Respectfully submitted,

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